Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

| In the Matter of |) |
|--|------------------------|
| Petition of the Verizon Telephone Companies For Expedited Forbearance from the Current Pricing Rules The Unbundled Network Element Platform |) WC Docket No. 03-157 |
| |) |

OPPOSITION OF BRIDGECOM INTERNATIONAL, INC.

BridgeCom International, Inc. (BridgeCom)¹ through undersigned counsel and pursuant to *Public Notice*, DA 03-2189 (released July 3, 2003) and Order, DA-032333 (released July 15, 2003), hereby opposes the "Petition for Expedited Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform" filed by the Verizon Telephone Companies ("Petitioner") in the captioned proceeding on July 1, 2003 (the "Petition"). As BridgeCom will demonstrate below, Petitioner has fundamentally failed to satisfy the statutory test for exercise by the Commission of its Section 10 forbearance authority.² Indeed, Petitioner's prayer for relief is both procedurally defective and substantively without merit. Accordingly, BridgeCom urges the Commission to summarily deny the Petition.

BridgeCom is a member of the PACE Coalition and fully endorses the Opposition filed by the Coalition to the Verizon Petition.

Section 10 of the Telecommunications Act of 1996 (the "Telecommunications Act"), Section 160 of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. § 160.

Petitioner urges the Commission to "immediately forbear from its decision permitting UNE-P carriers to collect per-minute access charges from long distance carriers . . . and, in addition, . . . forbear from applying its current TELRIC pricing rules to the so-called UNE platform." According to Petitioner, these are "interim measures" intended to "immediately address some of the most harmful aspects of [the Commission's TELRIC] pricing rules even while [the Commission] completes its general reform of those rules."

In support of the requested forbearance, Petitioner declares that "the TELRIC rules themselves are inherently flawed" and claims that, because of these flaws, "[a]pplying TELRIC to the UNE platform creates a system of uneconomic arbitrage." This uneconomic arbitrage, Petitioner continues, has "devalued the existing investments by incumbents and newer entrants alike in the nation's telecommunications infrastructure, . . . contributed materially to the massive decline in investment in the telecommunications industry, . . . [and] precluded the development of a rational wholesale market." "Given all of this," Petitioner opines, "the standard for forbearance set out in section 10 of the Act is unquestionably met," and the Commission would be "well within its authority forbear[ing] from applying TELRIC to UNE-P" and

Verizon Petition at 1. Petitioner has not identified the specific rule sections from which it has asked the Commission to forbear, a failing which alone should be fatal to the Petition. *See, e.g.,* The Commission's Rules Concerning Maritime Communications (Third Report and Order and Memorandum Opinion and Order), 13 FCC Rcd 19853, ¶ 55 (1998).

Verizon Petition at iii.

⁵ <u>Id</u>. at i.

⁶ Id. at ii - iii.

"eliminat[ing] the fiction that a UNE-P carrier is providing the exchange access on long distance calls."

Petitioner is wrong on all counts.

I. The Commission is Precluded by Section 10 of the Telecommunications Act from Granting the Forbearance Relief Sought By Petitioner

Section 10 of the Telecommunications Act expressly prohibits the Commission from "forbear[ing] from applying the requirements of section 251(c) or 271" until the Commission has made an affirmative determination that these provisions have been "fully implemented." The most recent time that the Commission was asked to address the issue of full implementation of Sections 251(c) and 271,9 it expressly

Verizon Petition at iii.

Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services (Memorandum Opinion and Order), 18 FCC Rcd 8134, ¶ 8, fn. 21 (WTB 2003) (subsequent history omitted). As recognized by the Commission, Section 251(c) and 271 are the two "cornerstones of the framework Congress established in the 1996 Act." Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd 24011, ¶ 76 (1998) (subsequent history omitted). Emphasizing the centrality of Section 251(c) and 271 to its vision of a competitive local exchange/exchange access market, Congress took additional steps to ensure that these provisions would accomplish their intended purpose, including designating them as the only "two provisions carved out in limiting the Commission's otherwise broad forbearance authority under section 10." Id. at ¶ 73. By excluding Section 251(c) and 271 from the Commission's forbearance authority until these provisions were fully implemented, Congress sought to ensure that local markets would be irreversibly open to competition before the principal mechanisms for achieving this end were lost. Hence, Section 10(d) is an integral part of the "blueprint in the 1996 Act for ensuring that all markets are open to competition," <u>Id.</u> at $\P 1$.

⁹ 47 U.S.C. §§ 251(c), 271.

declined to find that the requirements of these provisions had been fully implemented.¹⁰ Pertinent here are not only the Commission's refusal to find that Sections 251(c) and 271 had been fully implemented, but its stated reasons for not making such a finding. As the Commission noted, no party "had suggested that . . . section 251(c) or 271 had been fully implemented" and it "had no record on which to determine that either had been fully implemented."

In its Petition, Petitioner does not even attempt to argue that Section 251(c) or 271 has been fully implemented, relying instead upon the frivolous contention that grant of the forbearance relief it seeks here would not implicate these provisions. Having not offered such an argument, Petitioner has introduced into the record no evidence that such full implementation has been achieved. And as the Commission has correctly recognized, a determination of this magnitude cannot, and should not, be made absent a full hearing on the record, with ample opportunity for participation by all interested parties. Finally, given the Commission's recent conclusions that competitive local exchange carriers ("LECs") would continue to be impaired in the absence of unbundled access to incumbent LEC network elements. 12 the Commission's ongoing

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Deployment of Wireline Services Offering Advanced Telecommunications Capability (Order on Reconsideration, 15 FCC Rcd 17044, ¶ 5 (2000) (subsequent history omitted); see also Association of Communications Enterprises v. Federal Communications Commission, 235 F.2d 662, 666 (D.C. Cir. 2001) (subsequent history omitted) ("But the Commission 'may not forbear from applying the requirements of section 251(c) until it determines that those requirements have been fully implemented.' . . . Because those requirements have not been fully implemented here, the FCC (as it concedes) may not forbear.").

Deployment of Wireline Services Offering Advanced Telecommunications Capability (Order on Reconsideration), 15 FCC Rcd 17044 at ¶ 5.

FCC News Release, "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers" (released February 20, 2003).

local competition enforcement efforts,¹³ and the Commission's active Section 271 compliance program,¹⁴ no legitimate case could be advanced that either Section 251(c) or 271 has been fully implemented.

As to Petitioner's assertion that Section 10 does not stand as a bar to the relief it requests here because "neither TELRIC nor UNE-P is required by the Act," the contention establishes both too little and too much. In implementing Section 251(c), the Commission concluded that "Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service," that "section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination . . . [and] requires incumbent LECs,

See, e.g., FCC News Release, "FCC and BellSouth Enter into a \$1.4 Million Consent Decree Concerning Long-Distance and Non-Discrimination Requirements" (issued July 7, 2003); FCC News Release, "Qwest Admits Violations of Long Distance Ban – Company to Make \$6.5 Million Payment to United States Treasury" (issued May 7, 2003); FCC News Release, "FCC Finds that Verizon Violated Interconnection Requirements (issued April 23, 2003); FCC News Release, "Verizon Admits Violations of Long Distance Marketing Ban – Company to Make \$5.7 Million Payment to United States Treasury" (issued May 7, 2003); FCC News Release, "FCC Enforcement Bureau and Verizon Enter into Consent Decree; Verizon to Pay \$77,000 and Implement Remedial Actions to Help Ensure Compliance with Local Competition Rule" (issued September 14, 2001); FCC News Release, "FCC Enforcement Bureau Imposes \$94,500 Fine Against SBC for Violations of Local Competition Rule" (issued May 24, 2001).

See, e.g., Letter from Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Gordon R. Evans, Vice President – Federal Regulatory, Verizon Communications, Inc. re: Section 271 Compliance Review Program for Section 271 – Approved States in the Verizon Region, dated July 2, 2003 ("The Enforcement Bureau . . . will monitor Verizon's continuing compliance with section 271 in each of these states through the Section 271 Compliance Review Program. . . . During this review, the Team will closely review Verizon's performance in subject matter areas that the Commission has identified as areas of concern in the section 271 Order."). Petitioner's claim that Sections 251(c)(3) and 271 must be deemed fully implemented in a given state simply because the incumbent LEC serving that state has been authorized to originate interLATA calls in that state thus flies squarely in the face of Commission conclusions. Verizon Petition at 19, fn 38.

Verizon Petition at 19, fn 38.

if necessary, to perform the functions necessary to combine requested elements in any technically feasible manner," and hence that Section 251(c)(3) mandated the availability of the UNE platform. Moreover, the Commission determined that "section 251(c)(3) permits . . . all . . . requesting telecommunications carriers to purchase unbundled elements for the purpose of . . . providing exchange access to themselves in order to provide interexchange services to consumer," and that having done so, such carriers "are entitled to revenues from all of the services provided using those elements." And the Commission concluded that "prices for . . . unbundled elements pursuant to sections . . . 251(c)(3) and 252(d)(1) should be set at forward-looking long-run economic costs" in order to best facilitate the intent of the Telecommunications Act - i.e., to "encourag[e] competition by removing barriers to entry and providing an opportunity for potential new entrants to purchase unbundled incumbent LEC network elements to compete efficiently to provide local exchange services."

In short, Petitioner's claims to the contrary notwithstanding, the Commission has found that both UNE-P and TELRIC are required by the Telecommunications Act. And each of these findings has been specifically upheld on

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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd 15499, ¶ 293, 328 (1996) (subsequent history omitted). By extension, the UNE platform is also mandated by Section 271(c)(2)(B)(ii), 47 U.S.C. § 271(c)(2)(B)(ii), which identifies as a precondition to Bell Operating Company ("BOC") entry into, and continued participation in, the in-region, interLATA market, the provision by the BOC of "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c(3) and 252(d)(1)."

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd 15499 at ¶ 356, 980, fn 2312.

^{18 &}lt;u>Id</u>. at ¶ 672.

appeal.¹⁹ Hence, Section 10 stands as a bar to the forbearance relief Petitioner seeks here absent an affirmative finding that Sections 251(c)(3) and 271 have been fully implemented.

Just as Petitioner's claim here proves too little, it also proves too much. Petitioner contends that neither TELRIC nor UNE-P are mandated by the Telecommunications Act simply because there exist other plausible readings of Sections 251(c)(3) and 252(d)(1). If the Commission were to accept this claim, Section 10(d) would be rendered a nullity. Under Petitioner's reading, no matter how Section 251(c)(3) was implemented, forbearance would always be allowed because other possible means of implementation were available. It is a long-standing tenet of statutory construction that statutory provisions should not be construed to render them insignificant or without meaningful effect.²⁰ Accordingly, Petitioner's claims regarding the applicability of Section 10(d) must be rejected.

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AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1998); Verizon Communications Corp. v. Federal Communications Commission, 535 U.S. 467 (2002).

See, e.g., TRW Inc., v. Adelaide Andrews, 534 U.S. 19, 31 (2001) ("it is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.""); Lin Qi-Zhuo v. U.S. Immigration and Naturalization Service, 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage."); Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 833 - 34 (9th Cir. 1996) ("statute must be interpreted to give significance to all of its parts . . . statutes should not be construed to make surplusage of any provision"); Boise Cascade Corporation v. U.S. Environmental Protection Agency, 942 F.2d 1427, 1432 (9th Cir. 1991) ("[u]nder accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.").

II. Forbearance Petitions May Not be Used To Launch Collateral Attacks on the Validity of Rules

Much of the Petition is dedicated to an attack on the Commission's TELRIC and UNE-P rules, while precious little of the Petition deals with actual forbearance arguments. Thus, Petitioner argues that the Commission erred in adopting the TELRIC pricing guidelines because "rather than being grounded in the incumbent's existing network, . . . [they are] based on regulators' conceptions of the hypothetically most efficient technologies and network configuration," and that as a result, the TELRIC pricing guidelines "discourage investment by all carriers, impede competition, and undermine economic growth," problems which are "exacerbated" when these guidelines are applied to UNE-P.²¹ Moreover, Petitioner continues, the Commission's reading of Section 251(c)(3) to allow UNE-P carriers to collect access charges "further compounds the problem." In other words, Petitioner is arguing not that TELRIC and the UNE platform are no longer needed, but that they should never have been adopted.²³

In critical respects, a forbearance request is much like an application for waiver. Like a waiver application, a forbearance request asks the Commission to take potentially critical actions without benefit of notice and comment rulemaking, the procedural mechanism best suited to facilitate not only the fullest public participation, but

Verizon Petition at 1 - 12

 $[\]underline{\text{Id}}$. at 4-5.

Indeed, underlying Petitioner's prayer for relief here is the contention that the UNE platform is merely another form of total service resale. Hence, Petitioner seeks to re-price the UNE platform at resale rates and deny UNE-P carriers, like those carriers utilizing resale, the ability to collect access charges. Petitioners and others asserted these same positions when the Commission first implemented Section 251(c) only to have all of them soundly rejected. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶¶ 317 – 41.

the development of the most comprehensive record. In other words, a forbearance request, like a waiver application, is an extraordinary action, which must be used only in appropriate circumstances.

Like an application for waiver then, a forbearance request must assume the validity of the rule from which forbearance is sought; indeed, "[t]he very essence of a waiver is the assumed validity of a general rule."²⁴ A forbearance request thus should not challenge the *bona fides* of the rule as to which forbearance is sought; such matters are appropriately raised only in a rulemaking proceeding.²⁵ The proper focus for a forbearance request is to demonstrate that a rule already adopted is, due to changed circumstances, no longer necessary to protect the public interest.

If Petitioner wishes to have the Commission abolish or substantially modify the TELRIC pricing guidelines, it will have ample opportunity to do so in what Petitioner characterizes as the proceeding that the Commission "intends to initiate . . . to

WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969); Family Stations, Inc. v. DirecTV, Inc. (Memorandum Opinion and Order), 17 FCC Rcd 25333, ¶ 7 (2002); Southwestern Bell Telephone Tariff F.C.C. No. 73 (Order Concluding Investigation and Denying Application for Review), 12 FCC Rcd 19311, ¶ 63 (1997); Waiver of the Commission's Access Charge Rules, Bell Atlantic Telephone Companies Petition for Waiver Part 69.112(b) and (c) of the Commission's Rules to Offer Facilities Management Services (Order), 12 FCC Rcd 10196, ¶ 5 (1996).

Federal-State Joint Board on Universal Service; Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. d/b/a Oncor Communications, Inc. (Memorandum Opinion and Order), 16 FCC Rcd 4382, ¶ 14 (2001) ("we believe that this pending rulemaking presents the appropriate opportunity for the Commission to consider and implement changes to the universal service contribution methodology for all telecommunications carriers in a competitively neutral, non-discriminatory, and equitable manner, while preserving and advancing universal service."); <u>US West Communications</u>, Inc., Petition for Waiver (Order), 7 FCC Rcd 4043, ¶ 6 (1992); BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver (Memorandum Opinion and Order), 6 FCC Rcd 3336, ¶ 28 (1991) ("Rulemaking serves as the regulatory process by which changes of broad applicability in Commission policy or regulations may be adopted."); Request for Waiver of the Prime Time Access Rule: Station WTHR-TV, Indianapolis, Indiana (Memorandum Opinion and Order), 47 Rad.Reg.2d (P&F) 1130, ¶ 5 (1980).

reform its current TELRIC pricing rules."²⁶ It is in this upcoming rulemaking proceeding that the arguments Petitioner raises will be best aired and best resolved. The Commission should not permit its decision-making processes to be highjacked with respect to a matter of such critial importance, with a forbearance request being substituted for a full notice and comment rulemaking proceeding, to the detriment of the public interest.²⁷

III. **Action on the Forbearance Petitions Would Prejudge the Upcoming TELRIC Rulemaking**

As noted above, Petitioner anticipates that the Commission will soon commence a rulemaking proceeding "to reform its current TELRIC pricing rules." As is further noted above, it is in this upcoming rulemaking proceeding that the matters raised by Petitioner in its Petition would be best raised and addressed. Any actions taken by the Commission with regard to the Petition now (other than its summary dismissal on procedural grounds) would serve only to prejudge the upcoming rulemaking proceeding.

²⁶ Verizon Petition at 1.

The Commission may not use a forbearance proceeding as a rulemaking proceeding. The Courts have made clear that the Commission may not circumvent its statutory obligations by a procedural sleight of hand. Association of Communications Enterprises v. Federal Communications Commission, 235 F.2d 662 at 666. Moreover, the Commission may not disguise its departure from previous policies through forbearance; if the Commission is to modify its TELRIC pricing guidelines, as applicable to the UNE platform, it must announce that it is doing so and provide a reasoned basis for its actions. AT&T Corp. v. Federal Communications Commission, 236 F.3d. 729, 736 – 37 (D.C. Cir. 2001).

²⁸ Verizon Petition at 1.

"The Commission does not routinely waive rules merely because they might be modified in the future as the result of a pending rulemaking."²⁹ As the Commission has repeatedly recognized, if matters which are more properly debated in a pending rulemaking proceeding serve as the basis for a party-specific waiver, or in this instance, forbearance request, the Commission's actions in the rulemaking proceeding could well be prejudged.³⁰ Indeed, the Commission has expressed concern that waivers that anticipate a particular outcome of a pending rulemaking proceeding would constitute a "dangerous precedent."³¹ This same analysis holds true with equal force with respect to forbearance requests.

The appropriate forum for consideration of the relief Petitioner seeks is a rulemaking proceeding designed to develop a record upon which the Commission may determine what changes, if any, should be made to its TELRIC pricing guidelines. The Commission will soon initiate such a proceeding. No legitimate public policy purpose would be served by prejudging key elements of that proceeding within the far narrower consideration of a forbearance petition.

RKO General, Inc. (WGMS) (Memorandum Opinion and Order), 3 FCC Rcd 5262, ¶ 7 (1988) (subsequent history omitted); Time Warner Inc. Petition for Special Relief Requesting Waiver of 47 C.F.R. § 76.501(a) (Memorandum Opinion and Order), 12 FCC Rcd. 15300, ¶ 17, fn. 34 (1997) (subsequent history omitted).

FreePage Corporation Request for Waiver of Section 22.323, Experimental License, and Developmental License (Order), 15 FCC Rcd. 2556, ¶ 7 (WTB 2000); Application of Granite Broadcasting Corporation for Transfer of Control of Pacific FM, Incorporated, Licensee of KOFY-TV, San Francisco, California (Memorandum Opinion and Order), 13 FCC Rcd. 13035, ¶ 13 (1998) (subsequent history omitted).

Time Warner Inc. Petition for Special Relief Requesting Waiver of 47 C.F.R. § 76.501(a) (Memorandum Opinion and Order), 12 FCC Rcd. 15300, ¶ 17 (CSB 1997).

IV. The Petition Fails to Satisfy the Statutory Test for the Forbearance It Seeks

Section 10 of the Telecommunications Act permits the Commission to "forbear from applying any regulation or any provision of [the Communications Act of 1934, as amended (the "Communications Act") to a telecommunications carrier" only if the Commission "determines that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." Moreover, Section 10 requires the Commission to determine "whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."

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⁴⁷ U.S.C. § 160(a). As the Courts have noted, "[t]he statutory test for forbearance under § 10(a) has three prongs that must all be satisfied before the Commission is obligated to forbear from enforcing a regulation or a statutory provision. . . . The three prongs of § 10(a) are conjunctive. The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is satisfied." Cellular Telecommunications & Internet Association v. Federal Communications Commission, 330 F.3d 502, 509 (D.C. Cir. 2003).

³³ 47 U.S.C. § 160(b).

Critically, the Commission has recognized that "the decision to forbear from enforcing statutes and regulations is not a simple decision." As explained by the Commission, a decision of this magnitude "must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met." To this end, the Commission has emphasized that it "cannot forbear in the absence of a record that will permit . . . [it] to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision."

Petitioner's request for forbearance is based upon "the very broad, unsupported allegations of why the statutory criteria are met" that the Commission has declared inadequate. Petitioner broadly attributes to the TELRIC pricing guidelines and their use in pricing the UNE platform the myriad problems that have plagued the telecommunications industry over the last several years, including the devaluation of the telecommunications and equipment manufacturing sectors, the decline in investment in the telecommunications industry, and the absence of alternative wholesale channels.³⁷

Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers (First Report and Order), 15 FCC Rcd 17414, ¶ 13 (2000); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses (Sixth Report and Order and Order on Reconsideration), 15 FCC Rcd 16266, ¶ 59; The Commission's Rules Concerning Maritime Communications (Third Report and Order and Memorandum Opinion and Order), 13 FCC Rcd 19853 at ¶ 55 (forbearance request denied "because it . . . [was] too vague, both as to the specific provisions from which we should forbear from enforcing and as to why forbearance would be in the public interest"); Personal Communications Industry Association's Broadband Personal Communications Services (Memorandum Opinion and Order), 13 FCC Rcd 16857, ¶ 113 (1998).

Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers (First Report and Order), 15 FCC Rcd 17414 at ¶ 13.

³⁶ <u>Id</u>.

Verizon Petition at 5 - 12.

These problems are systemic, attributable to a host of factors not the least of which are conditions negatively impacting the economy as a whole, the fallout from the bursting of the Internet/telecommunications "bubble," and adverse consequences of business excesses resulting in large measure from "Wall Street-driven" business plans. It is just as likely that the UNE platform and the carriers that provide service using this vehicle mitigated, rather than contributed, to the telecommunications collapse. Certainly, quotes to the contrary from several Wall Street analysts – the same group that pumped up the Internet/telecommunications "bubble" – do not alone establish the necessary causality. Something more than data documenting declines in market capitalization, telecommunications investment and the survival of a handful of UNE-P carriers is necessary to make a causal case for the dramatic forbearance Petitioner seeks.³⁸

What specific forbearance "showings" Petitioner does offer can be readily dispensed with. As to the first prong of the forbearance standard, Petitioner suggests three reasons that "the current pricing rules for UNE-P are not necessary to ensure just, reasonable and nondiscriminatory rates." First, Petitioner opines that because TELRIC produces unjust and unreasonable rates, continued application of TELRIC pricing guidelines to UNE-P cannot be necessary to achieve just and reasonable rates. The simple answer is that the U.S. Supreme Court, 40 and the Commission before it, 41 have

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As on old-line Administrative Law Judge once quipped, the fact that an elephant didn't show up in your backyard after you sprayed elephant repellant doesn't establish that the elephant repellant you sprayed actually worked.

³⁹ Verizon Petition at 19.

Verizon Communications Corp. v. Federal Communications Commission, 535 U.S. 467 (2002).

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 672.

found otherwise, and Petitioner's disagreement with these holdings cannot justify forbearance.

Second, Petitioner contends that "the current pricing rules for UNE-P are not necessary to ensure just and reasonable rates because there are better alternatives." Once again, the answer is that the Commission adjudged TELRIC to be the best means by which to fulfill the Congressional directive to "encourage[] competition by removing barriers to entry and providing an opportunity for potential new entrants to purchase unbundled incumbent LEC network elements to compete efficiently to provide local exchange services," and that judgment was endorsed on appeal. And lastly, Petitioner asserts that "the current pricing rules for UNE-P are unnecessary to ensure nondiscriminatory rates" because "to the extent that the Commission determined that the resale pricing standard should govern in place of TELRIC in the case of UNE-P, the same rates would apply to all CLECs." To the contrary, competitive LECs using unbundled elements as part of the UNE platform would pay very different charges from competitive LECs making use of unbundled elements in conjunction with their own facilities.

As to the forbearance standard's second prong, Petitioner asserts that "applying the current pricing rules to UNE-P is not necessary to protect consumers" principally because forbearance will affirmatively further consumer interests by "encouraging the development of facilities-based competition and by promoting the kind

Verizon Petition at 19 - 20.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd 15499 at ¶ 672; Verizon Communications Corp. v. Federal Communications Commission, 535 U.S. 467 (2002).

Verizon Petition at 20.

of innovation and meaningful consumer choice that only real, as opposed to merely 'synthetic,' competition can produce." Continuing, Petitioner points to "competition from alternative delivery platforms," such as wireless and cable-based services. The easy answer is that the consumers who have ordered more than ten million lines from, and opted to secure local dial tone and a host of ancillary services from, UNE-P carriers would likely disagree with Petitioner's assessment that continued application of TELRIC pricing principals to the UNE platform is not necessary to protect their interests. Absent TELRIC pricing, the offerings selected by these consumers would likely become unavailable, or if available would offer none of the savings local exchange competition has brought to consumers.

As to the third prong of the forbearance standard, Petitioner baldly declares that "forbearance is in the public interest" because it "will restore rational investment incentives," benefiting "not only the telecommunications sector . . . but also . . . the ailing equipment manufacturers and high-tech sectors, . . . [and] contribute to economic growth and the country's international economic competitiveness." Initially, in arguing that forbearing from applying TELRIC and other pricing guidelines to the UNE platform, Petitioner has established an extraordinarily high hurdle for itself. It is a difficult, if not impossible case to make that the public interest would be better served by

Verizon Petition at 20.

Id. at 21 - 22.

Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, <u>Local Telephone Competition:</u> Status as of December 31, 2002, Table 4 (June 2003).

Verizon Petition at 23.

killing a successful mode of competition in the hope (as yet unrealized for the most part) that another mode of competition will emerge. The argument is counter-intuitive at best.

The public interest is a broad standard, to be exercised consistent with the underlying goals of the Communications Act, as amended by the Telecommunications Act. 49 Section 10 of the Telecommunications Act allows the Commission to consider a broad range of public interest factors, 50 not the least of which is the likely impact of forbearance on competitive market conditions and the extent to which forbearance would enhance competition among providers of telecommunications services.⁵¹ Two of the "[t]hree principal goals established by the telephony provisions of the . . . [Telecommunications] Act" are competitive goals, including "opening the local exchange and exchange access markets to competitive entry" and "promoting increased competition in telecommunications markets that are already open to competition, including the long distance market."52

With this as a backdrop, the UNE platform has provided the most viable vehicle for introducing and growing competition in the local exchange market. Roughly sixty percent of all lines served by competitive LECs are provided over the UNE

Washington Utilities and Transportation Commission v. Federal Communications Commission, 513 F.2d 1142, 1157 – 58 (9th Cir. 1975).

⁵⁰ The 2002 Biennial Regulatory Review (Report), 18 FCC Rcd 4726, ¶27 (2003).

⁵¹ 47 U.S.C. § 160(b).

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd 15499 at ¶ 3.

platform.⁵³ The forbearance Petitioner seeks would have a devastating impact on the ability of UNE-P carriers to compete effectively against the incumbent. The likely impact of forbearance on competitive market conditions and the extent to which forbearance would enhance competition among providers of telecommunications services is thus clear. In short, the Petition not only does not satisfy the third prong of the forbearance test, it runs directly contrary to it.

V. <u>Conclusion</u>

By reason of the foregoing, BridgeCom International, Inc. urges the Commission to deny the "Petition for Expedited Forbearance from the Current Pricing Rules for the Unbundled Network Element Platform" filed by the Verizon Telephone Companies.

Respectfully submitted,

BRIDGECOM INTERNATIONAL, INC.

By: _____/s/___ Charles C. Hunter, General Counsel Catherine M. Hannan, Deputy General Counsel 115 Stevens Avenue Third Floor Valhalla, New York 10595 (914) 742-5589

August 18, 2003

Its Attorneys

Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, <u>Local Telephone Competition</u>: <u>Status as of December 31, 2002 at</u> Table 4.

CERTIFICATE OF SERVICE

I, Catherine M. Hannan, do hereby certify that a true and correct copy of the foregoing Opposition of BridgeCom International, Inc. has been served by U.S. mail, postage prepaid, on the individuals listed below this 18th day of August, 2003:

Karen Zacharia Leslie V. Owsley Donna M. Epps Verizon Telephone Companies 1515 North Court House Road Fifth Floor Arlington, VA 22201

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> ____/s/_ Catherine M. Hannan